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Criminal Law - Attorney and Client - Conflict of Interest - Life Story Fee Contract

Cynthia Ann Watson

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CRIMINAL LAW—ATTORNEY AND CLIENT—CONFLICT OF INTEREST—LIFE STORY FEE CONTRACT—The California Supreme Court has held that the possibility of attorney conflicts of interest arising from a life-story fee contract with an indigent criminal defendant does not warrant pretrial removal of competent counsel if the defendant knowingly and intelligently waives the consequences of the attorney's potential conflicts.

Maxwell v. Superior Court, 30 Cal. 3d 606, 639 P.2d. 248, 180 Cal. Rptr. 177 (1982).

Bobby Joe Maxwell was charged with four counts of robbery and ten counts of murder.¹ Prior to arraignment on the charges, Maxwell entered into a fee contract with his defense counsel, in which he granted exclusive literary rights to his life story in exchange for representation up to and including the trial.²

The contract granted Maxwell's counsel the right to print confidential information concerning the defendant's life and waived the attorney-client privilege upon counsel's request; however, the agreement did not include attorney's fees for representation in appellate proceedings.³ The contract further provided that counsel would receive, as their fee, all rights, including entertainment and commercial exploitation rights, to the story of Maxwell's life.⁴ In exchange, Maxwell was to receive fifteen percent of the net profits from the exploitation of his life story as well as counsel's pledge to raise all appropriate defenses which were in Maxwell's best interest.⁵ In addition, he received counsel's promise to diligently conduct the best defense possible.⁶ The contract also advised Maxwell

1. *Maxwell v. Superior Court*, 30 Cal. 3d 606, 610, 639 P.2d 248, 249, 180 Cal. Rptr. 177, 179 (1982). The defendant faced the possibility of receiving the death penalty due to the special circumstances surrounding the crimes. *Id.*

2. *Id.* at 610, 639 P.2d at 250, 180 Cal. Rptr. at 179.

3. *Id.* These fees were subject to further negotiation. *Id.*

4. *Id.*

5. *Id.* at 611, 639 P.2d at 250, 180 Cal. Rptr. at 179.

6. *Id.* The contract specifically provided:

The Lawyers will raise every defense which they, in their best judgment based upon their experience feel is warranted by the evidence and information at their disposal and which, taking into consideration the flow of trial and trial tactics, is in Maxwell's best interests. The Lawyers will conduct all aspects of the defense of Maxwell as would a reasonably competent attorney acting as a diligent conscientious advocate.

Id.

of his right to court-appointed counsel due to his indigency and his right to seek the advice of independent counsel.⁷ Maxwell's retained counsel provided him with several listings of local attorneys to contact for independent advice.⁸

Maxwell was arraigned in municipal court where he entered a plea of not guilty, reserving the right to plead not guilty by reason of insanity.⁹ Defense counsel informed the court of Maxwell's indigency¹⁰ and further disclosed the existence of the life-story fee contract.¹¹ Prior to a preliminary hearing, the municipal judge questioned Maxwell regarding the life-story fee contract, revealing that Maxwell had been informed of the potential conflicts of interest,¹² but nevertheless desired his retained counsel to defend him subject to the conditions of the contract.¹³

After a preliminary hearing, Maxwell was arraigned in superior court, where he reiterated his municipal court plea.¹⁴ The superior court held a special hearing to determine whether the life-story fee contract created insurmountable conflicts of interest.¹⁵ Maxwell again stated that he was aware of the potential conflicts of interest set forth in the contract and that he knowingly and willingly waived advice of independent counsel regarding the contract.¹⁶ De-

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. See *Maxwell v. Superior Court*, 161 Cal. Rptr. 849 (1980), *rev'd*, *Maxwell v. Superior Court*, 30 Cal. 3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982). Paragraph 14 of the life-story fee contract disclosed the following conflicts of interest which might occur between Maxwell and counsel:

(a) The Lawyers may have an interest to create publicity which would increase the money which they might get as a result of this agreement, even if this publicity hurt Maxwell's defense.

(b) The Lawyers may have an interest not to raise certain defenses which would question the sanity or mental capacity of Maxwell because to raise these defenses might make this agreement between the Lawyers and Maxwell void or voidable by Maxwell.

(c) The Lawyers may have an interest in having Maxwell be convicted and even sentenced to death so that there would be increased publicity which might mean that the Lawyers would get more money as a result of this agreement.

(d) The Lawyers may have other interests which are adverse to Maxwell's interests as a result of this agreement

161 Cal. Rptr. at 852.

13. 161 Cal. Rptr. at 851.

14. *Id.* at 852. The court provided an investigator and defense psychiatrist to assist the defense in the preparation of the case. 30 Cal. 3d at 611, 639 P.2d at 250, 180 Cal. Rptr. at 179-80.

15. 30 Cal. 3d at 611, 639 P.2d at 250, 180 Cal. Rptr. at 180.

16. *Id.* at 611-12, 639 P.2d at 251, 180 Cal. Rptr. at 180. Superior court Judge Malone

spite Maxwell's request to retain his chosen counsel, the trial court, after reviewing the confidential psychiatric reports submitted, ruled that the life-story fee contract created a conflict of interest between attorney and client, which deprived Maxwell of effective assistance of counsel.¹⁷ The trial court recused Maxwell's attorneys and appointed other private counsel to represent him.¹⁸

The California Court of Appeals affirmed the trial court's decision, holding that the life-story fee contract violated the attorney-client privilege of confidentiality; that the defendant could not waive the right to effective assistance of counsel; and that the life-story fee contract threatened the integrity of the judicial system.¹⁹

On appeal, the California Supreme Court vacated the court of appeals' decision, holding that when a criminal defendant knowingly and willingly waives the consequences of potential conflicts of interest with his retained counsel, pretrial removal of competent counsel in a criminal case is unwarranted.²⁰

Justice Newman, writing for the majority,²¹ began by stating that the controversy, in substance, involved a conflict between the due process requirement of competent representation weighed against the interest of not interfering with the chosen counsel of the accused, which he also determined to be a due process requirement.²² The respondent, the superior court,²³ had argued that the life-story fee contract presented a conflict of interest adverse to the constitutional guarantees of the defendant's right to effective coun-

established through questions that Maxwell was literate (having completed the eighth grade), had read the entire contract, and had signed and initialed several key paragraphs. *Id.* at 611, 639 P.2d at 250-51, 180 Cal. Rptr. at 180.

17. *Id.* at 612, 639 P.2d at 250-51, 180 Cal. Rptr. at 180. Specifically, the court ruled that (1) Maxwell "knowingly and willingly" declined to seek the advice of independent counsel; (2) the competency of retained counsel was not at issue; and (3) retained counsel must nevertheless be dismissed due to the inherent conflict of interest created by the contract. *Id.* Maxwell sought mandate to overturn the trial court's ruling. *Id.*

18. *Id.*

19. See *Maxwell v. Superior Court*, 161 Cal. Rptr. 849 (1980), *rev'd*, *Maxwell v. Superior Court*, 30 Cal. 3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982). Presiding Justice Files dissented, stating that a criminal defendant should be represented by the attorney of his choice. He rejected the notion that an attorney will betray a client for his own gain. 161 Cal. Rptr. at 861 (Files, J., dissenting).

20. 30 Cal. 3d at 619, 639 P.2d at 255-56, 180 Cal. Rptr. at 185.

21. Justices Mosk, Broussard, and Tobriner concurred in Justice Newman's majority opinion. 30 Cal. 3d at 622, 639 P.2d at 258, 180 Cal. Rptr. at 187.

22. 30 Cal. 3d at 609, 639 P.2d at 249, 180 Cal. Rptr. at 178.

23. The People, the real party in interest, did not take a position on the superior court's order in the trial or appellate courts. 30 Cal. 3d at 612 n.2, 639 P.2d at 251 n.2, 180 Cal. Rptr. at 180 n.2.

sel.²⁴ Justice Newman stated that the right to counsel, as guaranteed by the California Constitution, includes the right to effective counsel, and that a conflict of interest between counsel and client may render advocacy deficient.²⁵

The court noted that protection of a defendant's right to loyal counsel is essential.²⁶ The trial judge must ensure that indigent defendants have effective counsel, free from prejudicial conflicts.²⁷ Justice Newman stressed that the amount of prejudice need not be shown when attacking a conviction on the ground that counsel's performance was adversely influenced by conflicts of interest; informed speculation that the conflict was prejudicial is sufficient to warrant a reversal of the conviction.²⁸

Justice Newman observed that effective assistance of counsel is closely related to representation by counsel of choice.²⁹ He noted that the courts have acknowledged that the right to counsel encompasses a defendant's right to choose his attorney if he has the financial resources to do so.³⁰ Justice Newman found that California decisions also support the principle that a defendant's right to counsel, although not absolute, should serve to restrain the trial judge from interfering with a defendant's choice of counsel when

24. *Id.* at 612, 639 P.2d at 251, 180 Cal. Rptr. at 180. Respondent further argued that the contract violated ethical standards and encroached upon the integrity of the judicial system. *Id.*

25. *Id.* See *People v. Corona*, 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1978), in which a criminal defendant entered into a life-story fee contract with his defense attorney who failed to raise obvious mental defenses at trial resulting in the defendant's being found guilty. *Id.* at 702, 145 Cal. Rptr. at 903. The *Maxwell* court noted that "effective" counsel envisions a higher standard than mere competence. 30 Cal. 3d at 612, 639 P.2d at 251, 180 Cal. Rptr. at 180.

26. *Id.*

27. *Id.* See *Cuyler v. Sullivan*, 446 U.S. 335 (1980), in which one defendant in a case involving multiple representation alleged that he was denied effective assistance of counsel because his defense lawyers represented conflicting interests. *Id.* at 338. *But see* *People v. Cook*, 13 Cal. 3d 663, 532 P.2d 148, 119 Cal. Rptr. 500 (1975), in which the defendants failed to show denial of effective assistance of counsel because of multiple representation by defense counsel. *Id.* at 673, 532 P.2d at 154, 119 Cal. Rptr. at 506.

28. 30 Cal. 3d at 612-13, 639 P.2d at 251, 180 Cal. Rptr. at 180. See *People v. Chacon*, 69 Cal. 2d 765, 447 P.2d 106, 73 Cal. Rptr. 10 (1968) (in case of multiple client representation, trial court's failure to advise criminal defendants of their right to separate counsel in the event of a conflict of interest required reversal).

29. 30 Cal. 3d at 613, 639 P.2d at 251, 180 Cal. Rptr. at 180.

30. *Id.* at 613, 639 P.2d at 251, 180 Cal. Rptr. at 180-81. See, e.g., *Willis v. United States*, 614 F.2d 1200 (9th Cir. 1979) (criminal defendant's claim of inadequate representation by defense counsel due to conflicts arising from joint representation of co-defendants rejected); *United States v. Bragan*, 499 F.2d 1376 (4th Cir. 1974) (affirmance of district court's decision, declaring that the absence of co-counsel at trial did not deprive the defendant of his right to counsel of choice since he was represented by experienced trial counsel).

he is financially able to retain an attorney.³¹

Justice Newman also stressed that the trial judge should not re-cuse counsel even if he believes the attorney to be incompetent. By doing so, he would be infringing upon defendant's right to counsel of his choice and likewise be challenging the independence of the bar.³² Furthermore, Justice Newman asserted that the court should not inquire into the financial relationship between defendant and his counsel, nor use this relationship as a basis for removing retained counsel because the attorney-client relationship is independent of the source of compensation.³³ In Justice Newman's opinion, any other holding would discriminate against an indigent's relationship with his counsel.³⁴ As viewed by Justice Newman, a judge's duty to avoid appointment of conflict-free counsel does not apply where counsel has been retained by a defendant.³⁵ A defendant has a right to retain counsel of his choice, a right which should not be challenged by the trial courts.³⁶

The court pointed out that a defendant's right to choose counsel

31. 30 Cal. 3d at 613, 639 P.2d at 252, 180 Cal. Rptr. at 181. See *People v. Crovedi*, 65 Cal. 2d 199, 417 P.2d 868, 53 Cal. Rptr. 284 (1966). In *Crovedi*, the court held that a reasonable effort should be made to ensure that a defendant able to retain counsel will be represented by that counsel, particularly when the defendant is not responsible for counsel's absence. *Id.* at 207, 417 P.2d at 874, 53 Cal. Rptr. at 290. The court concluded that:

[T]he state should keep to a necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best, using any legitimate means within his resources—and that desire can constitutionally be forced to yield only when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.

Id. at 207-08, 417 P.2d at 874, 53 Cal. Rptr. at 290.

32. 30 Cal. 3d at 614, 639 P.2d at 252, 180 Cal. Rptr. at 181. See *Smith v. Superior Court*, 68 Cal. 2d 547, 440 P.2d 65, 68 Cal. Rptr. 1 (1968). In *Smith*, the court ruled that a trial judge may not dismiss defense counsel on the belief that the attorney was ignorant of the controlling law in the case. *Id.* at 548, 440 P.2d at 75, 68 Cal. Rptr. at 11.

33. 30 Cal. 3d at 614, 639 P.2d at 252, 180 Cal. Rptr. at 181. The court noted that as was stated in *Smith*: "[T]he relationship is independent of the source of compensation, for an attorney's responsibility is to the person he has undertaken to represent rather than to the individual or agency which pays for the service." *Smith v. Superior Court*, 68 Cal. 2d at 547, 440 P.2d at 74, 68 Cal. Rptr. at 10.

34. *Id.* See *Ingram v. Justice Court*, 69 Cal. 2d 832, 447 P.2d 650, 73 Cal. Rptr. 410 (1968). The court in *Ingram* ruled that the trial court cannot review a public defender's determination that a defendant is indigent and entitled to his services. *Id.*, 447 P.2d at 655, 73 Cal. Rptr. at 415. See also *Cannon v. Commission on Judicial Qualifications*, 14 Cal. 3d 678, 537 P.2d 898, 122 Cal. Rptr. 778 (1975) (the involuntary removal of counsel severely limits a defendant's right to counsel and should be exercised only on the most flagrant misconduct or incompetence of counsel).

35. 30 Cal. 3d at 615, 639 P.2d at 253, 180 Cal. Rptr. at 182.

36. *Id.* See *People v. Cook*, 13 Cal. 3d 663, 532 P.2d 148, 119 Cal. Rptr. 500 (1975). See *supra* note 27.

also extends to his right to reject counsel.³⁷ A mentally competent defendant may dismiss his attorney and represent himself, thus waiving his right to counsel, and the trial judge may not interfere with the defendant's right to self-representation even if he doubts the defendant's ability.³⁸ Justice Newman stated that if a defendant gives the court sufficient notice of his desire to substitute appointed counsel, the court should, at the very least, question the defendant as to his reasons for such a request.³⁹ Based on an examination of prior case law, Justice Newman concluded that because a defendant's confidence in his lawyer is vital to his defense, the defendant's right to counsel of his choice must be respected by the courts whenever possible.⁴⁰

Justice Newman addressed the contrasting views of the effect of a life-story fee contract on the integrity of the judicial system.⁴¹ One view is that such contracts are prejudicial and unethical because they tempt attorneys to act adversely to their client's interest solely for commercial gain.⁴² Justice Newman noted that such contracts raise doubts under the California Rules of Professional Conduct as well.⁴³

37. 30 Cal. 3d at 615, 639 P.2d at 253, 180 Cal. Rptr. at 182.

38. *Id.* See *Faretta v. California*, 422 U.S. 806 (1975). The defendant in *Faretta* waived assistance of counsel, desiring to conduct his own defense, but the trial court refused to allow him to do so on the grounds that the defendant had not intelligently waived his right to counsel and had no constitutional right to conduct his own defense. *Id.* at 809-10. The United States Supreme Court overruled the trial court's decision, holding that *Faretta* did indeed have a constitutional right to conduct his own defense. *Id.* at 836.

39. 30 Cal. 3d at 615, 639 P.2d at 253, 180 Cal. Rptr. at 182. See *People v. Marsden*, 2 Cal. 3d 118, 465 P.2d 44, 84 Cal. Rptr. 156 (1970), in which the court held that the defendant was deprived of his constitutional right to effective assistance of counsel when the trial court denied the defendant's timely motion to substitute new counsel without giving the defendant an opportunity to state reasons for his request. *Id.* at 126, 465 P.2d at 49, 84 Cal. Rptr. at 161.

40. 30 Cal. 3d at 615, 639 P.2d at 253, 180 Cal. Rptr. at 182. See Carrington, *The Right to Zealous Counsel*, 1979 DUKE L.J. 1291.

41. 30 Cal. 3d at 616, 639 P.2d at 253, 180 Cal. Rptr. at 182.

42. *Id.* at 616, 639 P.2d at 253-54, 180 Cal. Rptr. at 182-83. See *United States v. Hearst*, 638 F.2d 1190 (9th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981). In *Hearst*, the defendant's attorney entered into a publication contract which created potential conflicts of interest and the court remanded the issue to the district court to determine whether the contract violated the criminal defendant's sixth amendment right to assistance of counsel during trial. *Id.* at 1193.

43. 30 Cal. 3d at 617-18 nn. 5 & 6, 639 P.2d at 253-54 nn. 5 & 6, 180 Cal. Rptr. at 183 nn. 5 & 6. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-4 (1979), which provides in pertinent part:

If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his

Justice Newman observed that some California precedents had recognized a court's power to recuse an attorney in order to guarantee a fair trial.⁴⁴ He found that the issue ultimately involved a conflict between a criminal defendant's right to counsel of his choice and the legal profession's need to maintain its ethical standards.⁴⁵ Justice Newman noted that California courts have upheld the dismissal of a district attorney who was personally prejudiced against the defendant to insure the prosecutor's impartiality in a criminal trial.⁴⁶ This protection was also extended to potential conflicts of interest between appointed counsel and indigent criminal defendants which were held so critical as to warrant reversal of a conviction regardless of proof of actual prejudice to the client.⁴⁷

Nevertheless, the court found that these prior cases did not au-

own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from his client . . . publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice of his client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended.

Id. See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-103(A) (1979), which provides that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client." *Id.* But cf. RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA R. 5-101 (West 1981) [hereinafter cited as C.R.C.P.], which provides in pertinent part:

A member of the State Bar shall not enter into a business transaction with a client . . . unless (1) the transaction and terms in which the member of the State Bar acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms which should have reasonably been understood by the client, (2) the client is given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction, and (3) the client consents in writing thereto.

Id. The court noted that the disclosure and advice of independent counsel provision in the life-story fee contract was a patent attempt to adhere to the rules of the California bar. 30 Cal. 3d at 617 n.6, 639 P.2d at 254 n.6, 180 Cal. Rptr. at 183 n.6.

44. *Id.* at 617, 639 P.2d at 254, 180 Cal. Rptr. at 183. See *Comden v. Superior Court*, 20 Cal. 3d 906, 576 P.2d 971, 145 Cal. Rptr. 9 (1978). In *Comden*, the court approved a trial judge's order forcing an attorney to withdraw from a civil case because of the likelihood that he would be called to testify. *Id.* at 915-16, 576 P.2d at 975, 145 Cal. Rptr. at 13.

45. 30 Cal. 3d at 617, 639 P.2d at 254, 180 Cal. Rptr. at 183. See *Comden v. Superior Court*, 20 Cal. 3d at 915, 576 P.2d at 975, 145 Cal. Rptr. at 13. See *supra* note 44.

46. 30 Cal. 3d at 617, 639 P.2d at 254, 180 Cal. Rptr. at 183. See *People v. Greer*, 19 Cal. 3d 255, 561 P.2d 1164, 137 Cal. Rptr. 476 (1977).

47. 30 Cal. 3d at 617-18, 639 P.2d at 254-55, 180 Cal. Rptr. at 184. See *People v. Barboza*, 29 Cal. 3d 375, 627 P.2d 188, 173 Cal. Rptr. 458 (1981) (irreconcilable conflicts found in budgetary scheme which discouraged public defender from disqualifying himself in multiple representation cases); *People v. Rhodes*, 12 Cal. 3d 180, 524 P.2d 363, 115 Cal. Rptr. 235 (1974) (city prosecutor may not defend indigent criminal defendant).

thorize dismissal of counsel in Maxwell's case.⁴⁸ The cases were found to be distinguishable from *Maxwell* in that the defendants themselves had either filed the recusal motion or had challenged their appointed counsel on appeal; thus there was no question of court interference with the defendants' right to chosen counsel.⁴⁹

Justice Newman explained that in *Comden v. Superior Court*⁵⁰ the California Supreme Court had suggested that the right to chosen counsel must be weighed strictly against conflicts of interest, professional ethics, and judicial integrity.⁵¹ Justice Newman stressed that the mere possibility of a conflict did not warrant pre-trial recusal over the defendant's informed objection.⁵² He concluded that when the possibility of a conflict is disclosed to the court and its inherent danger explained, the defendant may knowingly and intelligently waive the conflict and insist on representation by retained counsel.⁵³

The court also explained that a defendant's waiver of potential conflicts of interest cannot be inferred from a silent record⁵⁴ stating that the court will not assume that a defendant has knowingly and intelligently waived his right to alternate counsel if the defendant's waiver is not on record, despite the fact that potential con-

48. 30 Cal. 3d at 618, 639 P.2d at 255, 180 Cal. Rptr. at 184.

49. *Id.*

50. 20 Cal. 3d 906, 576 P.2d 971, 145 Cal. Rptr. 9 (1978).

51. 30 Cal. 3d at 618, 639 P.2d at 255, 180 Cal. Rptr. at 184. See 20 Cal. 3d at 910, 576 P.2d at 975, 145 Cal. Rptr. at 13. See *supra* note 44. Since *Comden*, the California State Bar has liberalized the rule on attorney-witnesses. See C.R.C.P., *supra* note 43, at R. 2-111 (A)(4). Counsel is not compelled to withdraw from a civil or a criminal case if the client consents in writing after full disclosure of counsel's dual role as advocate and witness and an opportunity to seek independent legal advice. *Id.* Thus, a defendant's right to chosen counsel outweighs potential conflicts of interest and is not a threat to judicial integrity, provided the defendant is fully informed of counsel's dual role. 30 Cal. 3d at 619 n.9, 639 P.2d at 255 n.9, 180 Cal. Rptr. at 184-85 n.9.

52. 30 Cal. 3d at 619, 639 P.2d at 255-56, 180 Cal. Rptr. at 185.

53. *Id.* The court explicitly disapproved of *People v. Wolfe*, 69 Cal. App. 3d 714, 138 Cal. Rptr. 235 (1977), in which the court of appeals upheld the trial court's recusal of a city councilman/attorney who represented a criminal defendant despite the defendant's informed waiver of any potential conflicts. California and United States Supreme Court precedents confirm that conflicts of interest may be waived and such waiver may not be attacked on federal constitutional grounds. See *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *People v. Chacon*, 69 Cal. 2d 765, 447 P.2d 106, 73 Cal. Rptr. 10 (1968). See *supra* notes 27, 28. However, on appeal the defendant may argue that he received ineffective assistance of counsel for other reasons, but the burden rests with him to show that the ineffective assistance did not arise from the conflict which was waived. 30 Cal. 3d at 619 n.11, 639 P.2d at 256 n.11, 180 Cal. Rptr. at 185 n.11.

54. 30 Cal. 3d at 620, 639 P.2d at 256, 180 Cal. Rptr. at 185. See *Carnley v. Cochran*, 369 U.S. 506 (1962) (defendant did not knowingly and intelligently waive his right to counsel; thus he was denied effective assistance of counsel during trial).

flicts were brought to the attention of the trial judge.⁵⁵ Justice Newman found that in *Maxwell*, the defendant and the court were thoroughly informed of the conflicts arising from the life-story fee contract prior to trial, but the defendant nevertheless refused to change counsel.⁵⁶ Justice Newman believed that the defendant's insistence on proceeding with his chosen counsel constituted a knowing and intelligent waiver of potential conflicts and precluded their recusal.⁵⁷ Justice Newman further noted that some federal cases have implied that an effective waiver applies only to conflicts which are explored by the trial judge.⁵⁸ He pointed out, however, that the trial judge may not be able to explore all imaginable consequences of a conflict because the information required to assess such consequences may be privileged.⁵⁹ Justice Newman maintained that in the parallel area of self-representation, a defendant's informed waiver of counsel has been held sufficient to allow trial to proceed where the defendant has been warned of the danger of proceeding on his own.⁶⁰

Justice Newman determined that the trial court's procedure in *Maxwell* sufficiently established that the defendant had been competent to waive his rights.⁶¹ He pointed out that there had been

55. 30 Cal. 3d at 620, 639 P.2d at 256, 180 Cal. Rptr. at 185. See *People v. Carter*, 66 Cal. 2d 666, 427 P.2d 214, 58 Cal. Rptr. 614 (1967) (no waiver of right to counsel found where a defendant's willingness to proceed without counsel was predicated upon his request for use of library facilities, which was accepted by the trial judge but never executed). See also Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119, 158-59 (1978).

56. 30 Cal. 3d at 621, 639 P.2d at 257, 180 Cal. Rptr. at 186.

57. *Id.*

58. *Id.* See *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978) (in multiple representation case, defendant's waiver of potential conflicts was held ineffective); *United States v. Eaglin*, 571 F.2d 1069 (9th Cir. 1977) (in multiple representation case, the court held that defendant knowingly and intelligently waived right to separate representation after extensive pretrial questioning of defendants and their counsel by the trial judge); *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975) (in multiple representation case where co-defendants testified against each other, the court held that the Constitution permits the defendants to waive intelligently and knowingly their right to effective counsel after thorough consultation with the trial judge).

59. 30 Cal. 3d at 621, 639 P.2d at 257, 180 Cal. Rptr. at 186.

60. *Id.* See *United States v. Dolan*, 570 F.2d 1177, 1181-82 (3d Cir. 1978); *People v. Cook*, 13 Cal. 3d 663, 532 P.2d 148, 119 Cal. Rptr. 500 (1975). See *supra* notes 27 & 58. See also Geer, *supra* note 55, at 148-51.

61. 30 Cal. 3d at 621, 639 P.2d at 257, 180 Cal. Rptr. at 186. See *People v. Teron*, 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979) (criminal defendant is competent to waive counsel if the election is made voluntarily and intelligently). But cf. *People v. Lopez*, 71 Cal. App. 3d 568, 138 Cal. Rptr. 36 (1977) (defendant did not knowingly and intelligently waive right to counsel when he was not advised of the hazards of self-representation until after his request was granted).

extensive pretrial inquiries into the terms of the contract where the potential economic conflicts of interest were detailed, that Maxwell was fully informed of the rights he was waiving, and that a psychological examination had revealed that Maxwell was competent to waive his rights.⁶² The court thus overturned the trial court's recusal order, concluding that Maxwell's waiver of potential conflicts was effectively and knowingly executed.⁶³ The court stressed, however, that its opinion expressed no moral or ethical approval of life-story fee contracts, but rather addressed only the narrow issue of right to representation by chosen counsel.⁶⁴

In a concurring opinion, Justice Kaus stated that he had hoped the court's opinion would have been harsher as to the propriety of the life-story fee contract. If the court had cast doubt on the life-story fee contract as a viable source of compensation, he explained, this issue probably would not recur.⁶⁵ Justice Kaus's reason for joining in the majority's result, however, was that in his opinion the California State Bar Court, rather than the trial court, had the duty to act on the ethical questions raised by a life-story fee contract.⁶⁶ He concluded that the trial court could not prevent Maxwell from raising attorney-client conflicts on appeal, if necessary.⁶⁷

Chief Justice Bird, in a concurring and dissenting opinion, agreed with the majority that the life-story fee contract was valid, subject to an effective waiver of potential conflicts of interest.⁶⁸ Chief Justice Bird noted that the courts have diligently worked to protect a defendant's right to be defended by his choice of counsel, regardless of his economic situation.⁶⁹ She observed that under the current system of justice, an indigent defendant may accept court-appointed counsel who may be a public defender or a private attorney; however, court-appointed attorneys generally are not properly

62. 30 Cal. 3d at 621-22, 639 P.2d at 257, 180 Cal. Rptr. at 186-87.

63. *Id.* at 622, 639 P.2d at 257, 180 Cal. Rptr. at 187. Justice Newman also found that the trial judge had reviewed each of the disclosure sections in the contract to ensure that the defendant fully understood each one. *Id.*

64. *Id.* at 622, 639 P.2d at 257-58, 180 Cal. Rptr. at 187.

65. *Id.* at 622-23, 639 P.2d at 258, 180 Cal. Rptr. at 187 (Kaus, J., concurring).

66. *Id.* at 623, 639 P.2d at 258, 180 Cal. Rptr. at 187 (Kaus, J., concurring). See *Comden v. Superior Court*, 20 Cal. 3d 906, 576 P.2d 971, 145 Cal. Rptr. 9 (1978) (Manuel, J., dissenting). See *supra* note 44.

67. 30 Cal. 3d at 623, 639 P.2d at 258, 180 Cal. Rptr. at 187. (Kaus, J., concurring).

68. *Id.* at 624, 639 P.2d at 259, 180 Cal. Rptr. at 188 (Bird, C.J., concurring and dissenting).

69. *Id.* at 623, 639 P.2d at 258, 180 Cal. Rptr. at 187 (Bird, C.J., concurring and dissenting). See *People v. Crovedi*, 65 Cal. 2d 199, 417 P.2d 868, 53 Cal. Rptr. 284 (1966). See *supra* note 31.

compensated, rendering it uneconomical for private attorneys to accept a court appointment.⁷⁰ Justice Bird stressed that the defendant's right to choose his counsel is an essential fundamental freedom,⁷¹ and that a life-story fee contract may be the only way an indigent criminal defendant can secure counsel of his choice.⁷² Chief Justice Bird maintained that to hold *any* life-story agreement impermissible would be to foreclose the indigent from perhaps his only opportunity to obtain counsel of his choice; she, therefore, cautioned counsel retained through this type of fee arrangement not to exploit their clients.⁷³ Chief Justice Bird thus concurred with the majority's view that a life-story fee contract is a valid method of retaining an attorney but that the defendant must knowingly and intelligently waive potential conflicts of interest arising from the contract.⁷⁴

The Chief Justice dissented in part because she believed that Maxwell was not aware of the ramifications of waiving the conflicts which were detailed in his contract.⁷⁵ The trial judge's identification of the basic problem and a statement that not all problems are foreseeable may be sufficient for an attorney, but they are inadequate for an intelligent decision by a lay person such as Maxwell.⁷⁶ Chief Justice Bird noted that Maxwell did not seek self-representation, but he needed and desired skilled legal advice.⁷⁷ She stressed that a lay person such as Maxwell needs legal assistance to fully understand the consequences of a waiver.⁷⁸

70. 30 Cal. 3d at 623, 639 P.2d at 258, 180 Cal. Rptr. at 188. (Bird, C.J., concurring and dissenting).

71. 30 Cal. 3d at 623, 639 P.2d at 258, 180 Cal. Rptr. at 187. (Bird, C.J., concurring and dissenting). See *People v. Holland*, 23 Cal. 3d 77, 588 P.2d 765, 151 Cal. Rptr. 625 (1978). In *Holland*, the trial court failed to aid the defendant in recovering funds confiscated at his arrest for use in retaining private counsel. The court held that the defendant was entitled to use his own resources to retain counsel of his choice and concluded that the trial court's failure to intervene violated the defendant's constitutional right to counsel. *Id.* at 89, 588 P.2d at 772, 151 Cal. Rptr. at 631-32.

72. 30 Cal. 3d at 624, 639 P.2d at 258-59, 180 Cal. Rptr. at 188 (Bird, C.J., concurring and dissenting).

73. *Id.* The Chief Justice further warned that an attorney must never be a party to violation of constitutionally enumerated rights. *Id.*

74. *Id.*

75. *Id.* at 625, 639 P.2d at 260, 180 Cal. Rptr. at 189 (Bird, C.J., concurring and dissenting).

76. *Id.* at 624, 639 P.2d at 259, 180 Cal. Rptr. at 188 (Bird, C.J., concurring and dissenting). The Chief Justice found inappropriate *Faretta v. California*, 422 U.S. 806 (1975). See *supra* note 38.

77. 30 Cal. 3d at 624, 639 P.2d at 259, 180 Cal. Rptr. at 188 (Bird, C.J., concurring and dissenting).

78. *Id.*

Chief Justice Bird pointed out that the contract in question raised a myriad of legal complications even to one trained in the law.⁷⁹ For example, Maxwell was not told that by accepting his counsel and waiving the conflicts of interest detailed in the contract, he could be precluded from raising certain issues such as inadequacy of counsel on appeal, particularly if the claim was predicated upon the conflicts waived by him in the pretrial inquiry.⁸⁰ Furthermore, Chief Justice Bird noted that Maxwell was not specifically informed of the impact of his waiver of the attorney-client privilege.⁸¹ She particularly criticized this aspect of Maxwell's waiver, by speculating that if he was convicted, but on appeal his conviction was reversed and remanded for retrial, Maxwell's current counsel was not obligated to represent him, and under the terms of the contract they could demand that he waive the attorney-client privilege prior to retrial.⁸² Any confidential information transmitted to these attorneys would then be vulnerable to subpoena by the prosecution on retrial.⁸³ Chief Justice Bird indicated that neither the trial court nor the written contract addressed these issues, and thus the record failed to show that Maxwell knowingly and intelligently waived his rights.⁸⁴ The Chief Justice, therefore, recommended the issuance of a peremptory writ, instructing the trial court to conduct further hearings, advising the defendant of all the potential conflicts and their corresponding consequences;⁸⁵ at which time Maxwell could decide whether to retain the attorneys who were parties to the contract.⁸⁶

Justice Richardson dissented on the grounds that the conflicts of interest which arose as a result of the life-story fee contract were

79. *Id.* at 624, 639 P.2d at 259, 180 Cal. Rptr. at 189.

80. *Id.* at 624-25, 639 P.2d at 259, 180 Cal. Rptr. at 189 (Bird, C.J., concurring and dissenting).

81. *Id.* at 625, 639 P.2d at 259, 180 Cal. Rptr. at 189 (Bird, C.J., concurring and dissenting). Section 37 of the contract provided that Maxwell would "waive upon demand by Lawyers the so called attorney-client privilege and any and all other privileges and rights which would prevent the full and complete exercise and exploitation of the rights granted to Lawyers herein." *Id.* (emphasis supplied by the court). Maxwell was not informed of the impact of this section on his privilege against self-incrimination. *Id.*

82. *Id.*

83. *Id.* at 625, 639 P.2d at 259-60, 180 Cal. Rptr. at 189 (Bird, C.J., concurring and dissenting).

84. *Id.*

85. *Id.*

86. *Id.* at 625-26, 639 P.2d at 260, 180 Cal. Rptr. at 189 (Bird, C.J., concurring and dissenting). See *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978); *United States v. Eaglin*, 571 F.2d 1069 (9th Cir. 1977); *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975). See *supra* note 58.

irreconcilable and justified the recusal of defense counsel.⁸⁷ In his view, Maxwell's life-story fee contract contained several objectionable features, including giving the attorneys irrevocable ownership and unlimited use of Maxwell's life story, past, present, and future; not requiring the attorneys to represent Maxwell on appeal; and allowing the defendant to waive the attorney-client privilege.⁸⁸ According to Justice Richardson, these terms of the contract threatened to deny the defendant serious present and future procedural protections.⁸⁹ Justice Richardson noted that agreements of this kind have been condemned on ethical grounds, and if implemented, would seriously erode the integrity of the judicial system.⁹⁰

Justice Richardson opined that while Maxwell was entitled to conflict-free counsel, a defendant's right to counsel of his choice is not constitutionally absolute.⁹¹ In Justice Richardson's opinion, due process mandates that assistance of counsel be "effective," and therefore, appointment of an attorney other than the one requested by the defendant does not violate the defendant's constitutional rights.⁹² In drawing the conclusion that the defendant's right to counsel of his choice is not absolute, the courts have stressed two major values crucial to the judicial system.⁹³ One value concerns preservation of the public's confidence in the system of criminal justice,⁹⁴ the second is the defendant's right to rep-

87. 30 Cal. 3d at 626, 639 P.2d at 260, 180 Cal. Rptr. at 189 (Richardson, J., dissenting). In Justice Richardson's view, the court's duty to assure a conflict-free defense represented the paramount interest. *Id.*

88. *Id.* Additional terms of the contract which disturbed Justice Richardson included: (1) the attorneys' right to 85% of the proceeds from exploiting the defendant's life story; (2) defendant's obligation to compensate his attorneys vested immediately in the attorneys; and (3) defendant's waiver of all claims for defamation in the exploitation of his life story. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 626, 639 P.2d at 260, 180 Cal. Rptr. at 190 (Richardson, J., dissenting).

92. *Id.* at 627, 639 P.2d at 260, 180 Cal. Rptr. at 190 (Richardson, J., dissenting). See *Glasser v. United States*, 315 U.S. 60 (1942) (trial court bears the responsibility of safeguarding the defendant's rights and ensuring that the waiver is made voluntarily and intelligently). See also *Drumgo v. Superior Court*, 8 Cal. 3d 930, 506 P.2d 1007, 106 Cal. Rptr. 631 (1973), *cert. denied*, 414 U.S. 979 (1973) (indigent defendant with court-appointed counsel is not entitled to choose his attorney). The *Drumgo* court concluded that the defendant's constitutional and statutory rights were not violated by appointment of an attorney whom the defendant had not requested. *Id.* at 934, 506 P.2d at 1009, 106 Cal. Rptr. at 633.

93. 30 Cal. 3d at 627, 639 P.2d at 260, 180 Cal. Rptr. at 190 (Richardson, J., dissenting).

94. *Id.* at 627, 639 P.2d at 261, 180 Cal. Rptr. at 190 (Richardson, J., dissenting). See *People v. Wolfe*, 69 Cal. App. 3d 714, 138 Cal. Rptr. 235 (1977). See *supra* note 53.

resentation by legal counsel.⁹⁵ Justice Richardson concluded that a defendant's right to representation by conflict-free legal counsel is paramount to the defendant's preference of counsel,⁹⁶ particularly when the defendant faces such serious consequences as the death penalty.⁹⁷

Justice Richardson outlined the conflicts of interest which were created by the life-story fee contract in *Maxwell*.⁹⁸ He found that although the contract specifically outlined several conflicts which might arise due to counsel's economic interests⁹⁹ and that Maxwell's counsel promised to diligently defend him at trial,¹⁰⁰ such promises were already required by law through the fiduciary relationship of attorney-client.¹⁰¹ Justice Richardson noted that in *People v. Barboza*,¹⁰² the court had dismissed counsel because the financial relationship between the county and the public defender's office created financial conflicts of interest which might have affected the attorney's trial tactics and hindered the defendant's right to effective counsel.¹⁰³ He similarly found that in *People v. Corona*,¹⁰⁴ in which counsel had a financial interest in a life-story fee contract, the court had concluded that the contract created a conflict which prevented the attorney from giving his undivided loyalty to the client.¹⁰⁵

Justice Richardson then stated his belief that the life-story fee contract in *Maxwell* contained "built-in" conflicts which were not detailed in the contract, nor revealed by the trial judge's question-

95. 30 Cal. 3d at 627, 639 P.2d at 261, 180 Cal. Rptr. at 190 (Richardson, J., dissenting). See *United States v. Carrigan*, 543 F.2d 1053 (2d Cir. 1976) (Lumbard, J., concurring). In *Carrigan*, defendants Carrigan and White were convicted of interstate transportation of stolen goods. Both defendants were represented by one counsel. A conflict arose when Carrigan gave testimony inconsistent with White's prior statements to investigators. *Id.*

96. 30 Cal. 3d at 627, 639 P.2d at 261, 180 Cal. Rptr. at 190 (Richardson, J., dissenting).

97. *Id.*

98. *Id.*

99. *Id.* at 627-28, 639 P.2d at 261, 180 Cal. Rptr. at 190 (Richardson, J., dissenting). See *supra* note 12.

100. 30 Cal. 3d at 628, 639 P.2d at 261, 180 Cal. Rptr. at 190 (Richardson, J., dissenting).

101. *Id.* at 628, 639 P.2d at 261, 180 Cal. Rptr. at 191 (Richardson, J., dissenting).

102. 29 Cal. 3d 375, 627 P.2d 188, 173 Cal. Rptr. 458 (1981). See *supra* note 47.

103. 30 Cal. 3d at 628-29, 639 P.2d at 261-62, 180 Cal. Rptr. at 191 (Richardson, J., dissenting).

104. 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1978). See *supra* note 25.

105. 80 Cal. App. 3d at 720, 145 Cal. Rptr. at 915. The court stated that "[f]rom that moment on, trial counsel was devoted to two masters with conflicting interests—he was forced to choose between his own pocketbook and the best interests of his client, the accused." *Id.*

ing.¹⁰⁶ Justice Richardson clarified these conflicts by considering the tactical decisions which Maxwell's trial counsel may have confronted prior to trial.¹⁰⁷ He questioned counsel's objectivity in considering a possible plea bargain which would avoid a trial but which would also reduce the commercial value of Maxwell's life story.¹⁰⁸ If Maxwell was tried, Justice Richardson speculated as to whether counsel would permit him to testify to enhance the saleability of the life story.¹⁰⁹ He also questioned whether counsel would assert the insanity defense, thus threatening the validity of the fee contract.¹¹⁰ Justice Richardson argued that the evidence failed to support the majority's position that Maxwell had fully recognized the legal implications of his waiver, including knowledge of the inherent conflicts not detailed in the contract.¹¹¹

Expressing doubt about counsel's pretrial good faith assurances to conduct a proper defense, Justice Richardson argued that it is nearly impossible for a trial judge to assess the impact of conflict of interest on counsel's decisions in plea bargains.¹¹² Likewise, Justice Richardson challenged the trial court's ability to fairly identify all the motives behind defense counsel's pretrial and trial decisions in a multiple murder case.¹¹³ He concluded that neither the defendant, the trial court, nor the appellate court can assess the impact of conflicts of interest on defense counsel's trial strategy.¹¹⁴

Justice Richardson noted that Maxwell had agreed to waive the attorney-client privilege upon demand by his counsel,¹¹⁵ but found

106. 30 Cal. 3d at 629, 639 P.2d at 262, 180 Cal. Rptr. at 191 (Richardson, J., dissenting).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 630, 639 P.2d at 262, 180 Cal. Rptr. at 191 (Richardson, J., dissenting).

112. *Id.* at 630, 639 P.2d at 262, 180 Cal. Rptr. at 192 (Richardson, J., dissenting).

113. *Id.*

114. *Id.* See *Holloway v. Arkansas*, 435 U.S. 475 (1978). The court reversed the trial court's denial of defense counsel's motion for separate counsel for the co-defendants he was representing. The defense counsel's request was predicated upon possible conflicts of interest which arose from confidential information received from the defendants. *Id.* at 490-91.

115. 30 Cal. 3d at 630-31, 639 P.2d at 263, 180 Cal. Rptr. at 192 (Richardson, J., dissenting). The lower court applied the RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA R. 5-101. See *supra* note 43, to paragraph 37 of the life-story fee contract which provides in pertinent part: "Maxwell does hereby agree to waive upon demand by Lawyers the so called attorney-client privilege and any and all other privileges and rights which would prevent the full and complete exercise and exploitation of the rights granted to Lawyers herein." 30 Cal. 3d at 630-31, 639 P.2d at 263, 180 Cal. Rptr. at 192 (emphasis supplied by the court).

that a waiver of this confidential relationship may have inhibited communications between them, thus jeopardizing Maxwell's defense at trial and interfering with the judicial process.¹¹⁶ Justice Richardson observed that although counsel had conceded that the waiver of the attorney-client privilege was overreaching, the defendant had still pledged to assist the attorneys by disclosing any information required by them or their agents in exploiting his life story.¹¹⁷ In essence, Justice Richardson found that the substance of a waiver remained in the contract, and such disclosure was irreconcilable with the attorneys' duty to preserve Maxwell's confidences.¹¹⁸ Justice Richardson pointed out that another problem with the life-story fee contract was that it only obligated Maxwell's attorneys to represent him during trial, leaving them free to publicize confidential communications during Maxwell's appeal, should he be convicted.¹¹⁹ He hypothesized that the appellate briefs might be filed contemporaneously with the publishing of Maxwell's life story.¹²⁰ With no right to suppress publication, Maxwell could forfeit his rights to preserve attorney-client confidences during his appeal and on subsequent retrial.¹²¹

Justice Richardson then addressed the impact of judicial approval of life-story fee contracts on the integrity of the judicial system.¹²² He noted that although the average lay person accepts the life-story fee contract as an ordinary commercial agreement, the legal impropriety of the contract soils the ethical relationship between attorney and client.¹²³ Justice Richardson warned that if the

116. *Id.* at 631, 639 P.2d at 263, 180 Cal. Rptr. at 192 (Richardson, J., dissenting). The appellate court noted that "[t]he confidential relationship between attorney and client is at the heart of a proper functioning of our judicial system." *Maxwell v. Superior Court*, 161 Cal. Rptr. 849, 854 (1980), *rev'd*, *Maxwell v. Superior Court*, 30 Cal. 3d 606, 631, 639 P.2d 248, 263, 180 Cal. Rptr. 177, 192 (1982).

117. 30 Cal. 3d at 631, 639 P.2d at 263, 180 Cal. Rptr. at 192 (Richardson, J., dissenting). Paragraph 33 of the life-story fee contract provided that the defendant "promises, covenants and agrees to assist the lawyers at any and all times and in any and all ways permissible by law in the protection, exercise, and exploitation of their rights to the Story." *Id.*

118. *Id.* See CAL. BUS. & PROF. CODE § 6068 (Deering 1974), which provides in pertinent part: "It is the duty of an attorney . . . (e) to maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client." *Id.*

119. 30 Cal. 3d at 631, 639 P.2d at 263, 180 Cal. Rptr. at 193 (Richardson, J., dissenting). Justice Richardson cautioned that at the appellate stage Maxwell would no longer be the "owner" of his life story and that his former attorneys might only be interested in promoting the sale of the story. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 632, 639 P.2d at 263, 180 Cal. Rptr. at 193 (Richardson, J., dissenting).

123. *Id.* at 632, 639 P.2d at 263-64, 180 Cal. Rptr. at 193 (Richardson, J., dissenting).

courts accepted life-story fee contracts such as the one in dispute, public trust in the judicial process would deteriorate, a trust which is predicated on the fiduciary relationship and protection of the client's legal rights, not on economic advantage.¹²⁴ Justice Richardson stated that the life-story fee contract has been discouraged by the American Bar Association (ABA).¹²⁵ He argued that life-story fee contracts should be judicially condemned,¹²⁶ concluding that it is the court's duty to maintain the integrity of the judicial system and promote public confidence in criminal justice.¹²⁷ Justice Richardson argued that the majority's conclusion conflicted with California decisions which emphasize that a defendant may waive rights which protect him, but rights which belong to the public and impose a duty on the court cannot be waived.¹²⁸ He noted that, in fact, waiver of these rights has been held ineffective when it involved denying a parallel duty imposed upon the court.¹²⁹ Justice Richardson explained that the majority's holding raised the defendant's right to counsel of his choice above the court's "correlative duty" to insure that the defendant has effective, conflict-free counsel.¹³⁰ He found that the trial judge has the duty to conduct a fair and lawful trial, without becoming subservient to defense counsel's objections regarding the defendant's right to assistance of

124. *Id.*

125. *Id.* See ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-4 (1979). See *supra* note 43. In addition, the latest discussion draft of the ABA MODEL RULES OF PROFESSIONAL CONDUCT prohibits this form of contractual agreement outright, declaring: "An agreement by which a lawyer acquires literary rights concerning the subject matter of the representation involves incompatible standards for the lawyer's performance, one being effectiveness in representing the client and the other being performance that has literary value." Comment, Proposed Rule 1.9(d). See 30 Cal. 3d at 633, 639 P.2d at 264, 180 Cal. Rptr. at 193 (Richardson, J., dissenting) (emphasis added).

126. 30 Cal. 3d at 633, 639 P.2d at 264, 180 Cal. Rptr. at 193 (Richardson, J., dissenting). See *United States v. Hearst*, 639 F.2d 1190, 1198, cert. denied *sub nom.* *Hearst v. United States*, 452 U.S. 931 (1981).

127. 30 Cal. 3d at 633, 639 P.2d at 264-65, 180 Cal. Rptr. at 194 (Richardson, J., dissenting). See *People v. Rhodes*, 12 Cal. 3d 180, 524 P.2d 363, 115 Cal. Rptr. 235 (1974). See *supra* note 47.

128. 30 Cal. 3d at 634, 639 P.2d at 265, 180 Cal. Rptr. at 194 (Richardson, J., dissenting). See *People v. Chadd*, 28 Cal. 3d 739, 621 P.2d 837, 170 Cal. Rptr. 798 (1981), cert. denied, *sub nom.*, *California v. Chadd*, 452 U.S. 931 (1982) (the court denied a criminal defendant facing the death penalty the right to plead guilty against the advice of counsel).

129. 30 Cal. 3d at 634, 639 P.2d at 265, 180 Cal. Rptr. at 194 (Richardson, J., dissenting). See *People v. Teron*, 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979). See *supra* note 61.

130. 30 Cal. 3d at 634, 639 P.2d at 265, 180 Cal. Rptr. at 194-95 (Richardson, J., dissenting).

counsel.¹³¹

In essence, Justice Richardson concluded that the ultimate issue before the court involved a conflict of a defendant's right to choice of counsel and the need to maintain professional ethics.¹³² Justice Richardson would choose to preclude an attorney from entering into a fee arrangement which could hinder his performance during trial.¹³³ He was not persuaded by the majority's argument that the defendant successfully may waive his right to conflict-free counsel because an independent right to self-representation had previously been found by the California courts.¹³⁴ The issue before the *Maxwell* court did not involve a defendant's right to self-representation, but whether the trial court had the power to demand conflict-free counsel for defendant.¹³⁵

In conclusion, Justice Richardson noted that the ethical position established in California decrees that fidelity is one of the principal obligations of an attorney, and an attorney should jealously guard the secret confidences of his client.¹³⁶ This rule prevents an attorney from putting himself in a compromising situation to choose between conflicting interests rather than expend his energies exclusively in the interest of his client.¹³⁷ Justice Richardson stated that although the majority did not give their moral or ethical approval of life-story fee contracts, the decision nevertheless sanctioned their use.¹³⁸ He concluded that the majority should have candidly declared such contracts invalid to avoid any misapprehension of the interested parties.¹³⁹ Justice Richardson would thus have judicially declared life-story fee contracts invalid as a

131. *Id.* at 635, 639 P.2d at 265, 180 Cal. Rptr. at 195 (Richardson, J., dissenting). See *Lakeside v. Oregon*, 435 U.S. 333 (1978), in which the United States Supreme Court stated that "the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct." *Id.* at 341-42.

132. 30 Cal. 3d at 635, 639 P.2d at 266, 180 Cal. Rptr. at 195 (Richardson, J., dissenting).

133. *Id.* Justice Richardson perceived the court as being the proper forum for resolving the issue. *Id.*

134. *Id.* See *Faretta v. California*, 422 U.S. 806 (1975). See *supra* note 38.

135. 30 Cal. 3d at 635-36, 639 P.2d at 266, 180 Cal. Rptr. at 195 (Richardson, J., dissenting).

136. 30 Cal. 3d at 636, 639 P.2d at 266, 180 Cal. Rptr. at 195 (Richardson, J., dissenting).

137. *Id.* See *Anderson v. Eaton*, 211 Cal. 116, 293 P. 788 (1930) (contract retaining attorney held void as against public policy because attorney represented defendant insurance agency and plaintiff in same cause of action).

138. 30 Cal. 3d at 636, 639 P.2d at 266, 180 Cal. Rptr. at 196 (Richardson, J., dissenting).

139. *Id.*

rule of criminal procedure.¹⁴⁰

California courts have held that the defendant's right to representation by counsel of his choice is unqualified. In *People v. Crovedi*,¹⁴¹ Crovedi's counsel suffered a heart attack during trial, and the court appointed new counsel from the same law firm to represent Crovedi. Refusing new counsel, Crovedi requested a six week continuance until his original attorney recuperated, but the trial court denied his request and gave the new counsel one week to prepare his case.¹⁴² The California Supreme Court weighed the desire for a speedy trial with the defendant's right to retain counsel of his choice, and concluded that although the defendant did not have an absolute right to be represented by counsel of his choice, a reasonable effort should be made to ensure that a defendant financially able to retain his own counsel should be represented by that counsel.¹⁴³

Along the same lines, the United States Supreme Court has held that a defendant's right to choose counsel also extends to self-representation.¹⁴⁴ In *Faretta v. California*,¹⁴⁵ the defendant waived assistance of counsel, desiring to conduct his own defense; but the trial court refused on the grounds that the defendant had not intelligently waived his right to counsel and that he had no constitutional right to conduct his own defense.¹⁴⁶ The Court vacated the ruling, holding that a criminal defendant does have a constitutional right, based on the historical development of the English court system¹⁴⁷ and implied by the sixth amendment, to conduct his own defense without counsel when he freely and intelligently

140. *Id.* See *People v. Barboza*, 29 Cal. 3d 375, 627 P.2d 188, 173 Cal. Rptr. 458 (1981); *People v. Rhodes*, 12 Cal. 3d 180, 524 P.2d 363, 115 Cal. Rptr. 235 (1974). See *supra* note 47.

141. 65 Cal. 2d 199, 417 P.2d 868, 53 Cal. Rptr. 284 (1966). See *supra* note 31.

142. 65 Cal. 2d at 202, 417 P.2d at 870-71, 53 Cal. Rptr. at 286-87.

143. *Id.* at 207, 417 P.2d at 874, 53 Cal. Rptr. at 290.

144. See *Faretta v. California*, 422 U.S. 806 (1975). See *supra* note 38.

145. 422 U.S. 806 (1975).

146. *Id.* at 808-10.

147. *Id.* at 821. The Star Chamber, which flourished in Great Britain in the late 16th and early 17th centuries, was the only tribunal in English legal history to force counsel upon an unwilling defendant in a criminal proceeding. *Id.* The defendant's answer to an indictment was not accepted unless signed by counsel; and if counsel refused to sign, the defendant was assumed to have confessed. *Id.* at 821-22. The Star Chamber was dissolved in 1641 along with the idea of obligatory counsel. *Id.* at 823. The common law evolved into a practice of mandatory self-representation for serious crimes. *Id.* By 1836, a defendant accused of a felony was permitted to retain counsel, and more recently the court would appoint counsel at the defendant's request. *Id.* at 825. At no point in the reform of the criminal justice system was counsel forced upon a defendant. *Id.* at 825-26.

makes such a choice.¹⁴⁸

These cases and others prior to *Maxwell* dealt with the defendant's right to choose counsel; they did not, however, deal with *pretrial* removal of defense counsel because of possible conflicts of interest. The situation has arisen in criminal cases, however, where joint representation has frequently been held a source of conflict. In such cases, defense counsel is not barred *per se* in pretrial proceedings.¹⁴⁹ The rationale has been that although the mere possibility of a conflict in cases of multiple representation will not warrant reversal of a criminal conviction,¹⁵⁰ the defendants should be fully informed prior to trial of the facts underlying potential conflicts¹⁵¹ and of their right to separate counsel. Thus, in *People v. Chacon*,¹⁵² the California Supreme Court held that a waiver of the right to separate counsel cannot be inferred from the defendant's silence;¹⁵³ instead, this right must be expressly waived by the defendants prior to trial. Likewise, the *Chacon* court and the Fifth Circuit Court of Appeals in *United States v. Garcia*¹⁵⁴ stressed the importance of fully informing defendants of their right to separate counsel if the court knows or should know that the possibility of a conflict exists.¹⁵⁵

The right to representation by counsel of one's choice was first proclaimed as a constitutional right in *Garcia*,¹⁵⁶ in which the United States Supreme Court held that a defendant's right to self-representation was implied by the sixth amendment. The right to choice of counsel has been referred to as a constitutional right stemming from the right to self-representation.¹⁵⁷ In *Faretta*, however, the Court found that the right to self-representation was an independent constitutional right, not to be inferred from the right

148. *Id.* at 819.

149. See Comment, *Conflicting Interests in Lawyer-Client Publication Rights Agreements—The Story of Bobby Joe Maxwell*, 42 U. PITT. L. REV. 869, 881 (1981). See also *Holloway v. Arkansas*, 435 U.S. 475 (1978). See *supra* note 114. The *Holloway* Court ruled that the possibility of ineffective counsel in a case of joint representation is outweighed by the economical and perhaps even strategical benefit of joint representation. 435 U.S. at 482.

150. *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). See *Ray v. Rose*, 535 F.2d 966 (6th Cir. 1976) (the court sustained the appellate court ruling that defendant failed to show that he was prejudiced during trial by literary contracts with a third person who agreed to sell defendant's life story to finance his defense).

151. *United States v. Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976).

152. 69 Cal. 2d 765, 447 P.2d 106, 73 Cal. Rptr. 10 (1968).

153. *Id.* at 771, 447 P.2d at 112, 73 Cal. Rptr. at 16.

154. 517 F.2d 272 (5th Cir. 1975).

155. 69 Cal. 2d at 771, 447 P.2d at 112, 73 Cal. Rptr. at 16. See *supra* note 28.

156. 517 F.2d 272 (5th Cir. 1975).

157. See *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975). See *supra* note 58.

to waive assistance of counsel.¹⁵⁸

Although a life-story fee contract has been held to prevent an attorney from adequately representing his client, it has not been the basis for removal of counsel in the pretrial stage. For example, in *People v. Corona*,¹⁵⁹ an attorney retained under a life-story fee contract failed to address at trial the question of the sanity of his client, a criminal defendant charged with multiple murders.¹⁶⁰ The California Court of Appeals ruled that the defendant was prejudiced by the attorney's conduct, and that the fee arrangement prevented the attorney from adequately representing his client.¹⁶¹ Thus, the court of appeals held that actual prejudice had resulted.¹⁶² The court's decision was based on its review of the entire record *after* trial, which revealed that counsel had failed to raise the crucial mental defenses.¹⁶³ In contrast, *Maxwell* involved a pre-trial recusal of counsel as a matter of law, where the only evidence of prejudice on the part of defense counsel was the contract itself.¹⁶⁴ Thus, the decision in *Maxwell* is a logical one on this basis.

In addition, the court's refusal to strike down all life-story fee contracts as unethical may be justifiable in another sense. As noted by Chief Justice Bird, the life-story fee contract provides an indigent defendant with the financial resources required to retain private counsel.¹⁶⁵ Although conflicts of interest may arise, they are subject to waiver provided the defendant is fully informed of the consequences.¹⁶⁶

One problem with the court's decision is that a waiver is ineffective if the defendant is unaware that a conflict may develop.¹⁶⁷ As a layman, the defendant may not comprehend the effect of a waiver on trial strategies and defenses.¹⁶⁸ In addition, the courts

158. 422 U.S. at 836.

159. 80 Cal. App. 3d 685, 145 Cal. Rptr. 894 (1978).

160. *Id.* at 702, 145 Cal. Rptr. at 903.

161. *Id.* at 720, 145 Cal. Rptr. at 915.

162. *Id.* at 727, 145 Cal. Rptr. at 920.

163. *Id.* at 706, 145 Cal. Rptr. at 906.

164. 30 Cal. 3d at 610, 639 P.2d at 249, 180 Cal. Rptr. at 178.

165. See *supra* note 76 and accompanying text.

166. See *Glasser v. United States*, 315 U.S. 60 (1942). See *supra* note 92.

167. See *Geer*, *supra* note 55, at 140.

168. See *id.* Maxwell's attorneys' actions prior to trial manifested no obvious adverse effects from these potential conflicts. Maxwell's counsel reserved the insanity plea, requested a closed preliminary hearing (possibly to curtail publicity), and disclosed all conflicts to the trial court and the defendant as required by the California State Bar. 30 Cal. 3d at 611, 639 P.2d at 250, 180 Cal. Rptr. at 179. See *supra* note 12. See also Comment, *supra* note 149, at 889.

have difficulty determining whether an unsophisticated defendant fully understands the rights waived, or, in a pretrial waiver, whether the defendant foresees all the possible conflicts which may occur.¹⁶⁹ If the trial court cannot determine the extent of the defendant's understanding, the court's efforts to adequately inform the defendant of the consequences of a waiver will most likely be ineffective.¹⁷⁰

Because of this, the courts may be forced to rely on the attorneys themselves to explain to their clients the consequences of a waiver.¹⁷¹ The results may not be helpful. In theory, an attorney has an obligation to withdraw from cases where potential conflicts may adversely influence his defense of a client,¹⁷² not only to protect the client's interest, but to protect the public's interest in a fair and expeditious trial.¹⁷³ However, one study of lawyer's ethics implies that practicing attorneys do not give avoidance of conflict of interest high priority, and another study indicates that attorneys generally are unaware of many of their ethical obligations as outlined in the Code of Professional Responsibility.¹⁷⁴ An attorney's ethical obligation to avoid conflicts is designed to protect the interests of the client, and a defendant will rely on his counsel's judgment to advise him of any conflicts which may jeopardize his defense.¹⁷⁵

In *Maxwell*, defense counsel attempted to fulfill their ethical obligations by carefully following the California Rules of Professional Conduct, disclosing the potential conflicts and advising Maxwell to seek the advice of independent counsel.¹⁷⁶ In addition, the conflicts found by the trial court in *Maxwell* were not irreconcilable. The court's concerns pertaining to adverse publicity and conviction were either weak or non-existent conflicts because publicity of this

169. See Geer, *supra* note 55. In *Maxwell*, the foreseeable conflicts of interest which arose as a result of the life-story fee contract focused on counsel's potential to create adverse publicity of the trial, to avoid an insanity plea, and to aid in the defendant's conviction for added publicity value. 30 Cal. 3d at 611, 639 P.2d at 250, 180 Cal. Rptr. at 179. See *supra* note 12. As noted by Chief Justice Bird and Justice Richardson, the trial court and the majority failed to address potential conflicts, such as waiver of the attorney-client privilege, not explicitly mentioned as conflicts in the contract. 30 Cal. 3d at 625, 639 P.2d at 259, 180 Cal. Rptr. at 188-89 (Bird, C.J., concurring and dissenting).

170. See Geer, *supra* note 55, at 142.

171. 30 Cal. 3d at 617, 639 P.2d at 254, 180 Cal. Rptr. at 183.

172. See Geer, *supra* note 55, at 149.

173. *Id.* at 151.

174. *Id.* at 153.

175. *Id.* at 154.

176. See C.R.C.P., *supra* note 43, at R. 5-101.

type could ruin counsels' reputation as competent criminal attorneys.¹⁷⁷ Also, as noted by the *Maxwell* majority, the potential conflicts raised in a life-story fee contract are no more prejudicial than some other financial arrangements between attorney and client.¹⁷⁸ Ultimately, the determination of right and wrong will remain with the attorney who must act in accordance with his moral and ethical conscience.¹⁷⁹

The United States Supreme Court's reluctance to interfere judicially with attorney-client fee arrangements may be evidenced by the Court's refusal to grant certiorari in cases involving life-story fee contracts.¹⁸⁰ Even the *Maxwell* court did not explicitly rule on the ethics of these arrangements.¹⁸¹ Instead, the majority limited the court's duty to ensuring that the defendant's waiver of potential conflicts of interest inherent in these contracts is made knowingly and intelligently. The *Maxwell* court should have gone one step further and held that the courts will not regulate these fee arrangements between attorney and client, without a showing of actual prejudice, but instead will leave such regulation to the local bar association.

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177. 30 Cal. 3d at 618 n.8, 639 P.2d at 255 n.8, 180 Cal. Rptr. at 184 n.8.

178. *Id.* See *Maxwell v. Superior Court*, 161 Cal. Rptr. 849, 862 (1980) (Files, J., dissenting). For example, a flat fee arrangement may encourage an attorney to dispose of the case quickly, while an hourly rate would encourage an attorney to prolong the case to obtain the maximum fee. Moreover, the contingent fee contract may potentially create a conflict when an attorney seeks a quick settlement to the detriment of the client. 30 Cal. 3d at 618 n.8, 639 P.2d at 255 n.8, 180 Cal. Rptr. at 184 n.8.

179. See Comment, *The Lawyer's Moral Paradox*, 1979 DUKE L.J. 1335, 1336.

180. See *United States v. Hearst*, 638 F.2d 1190 (9th Cir. 1980), cert. denied, 451 U.S. 938 (1981). See *supra* note 42.

181. 30 Cal. 3d at 622, 639 P.2d at 257, 180 Cal. Rptr. at 187.

